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STUART J. O'HARE
CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CERRO COPPER PRODUCTS CO.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**NO: 92-CV-0204-PER**
	)	
MONSANTO COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

RILEY, District Judge:

This matter comes before the Court on four pending motions: Plaintiff Cerro Copper Products Co.'s Motion for Partial Summary Judgment (Doc. 130); Defendant Monsanto Company's Motion to Strike the Jury Demand (Doc. 110); Monsanto's Motion to Strike Plaintiff's Prayer for Attorneys' Fees (Doc. 108); and Monsanto's Motion to Exclude Expert Testimony from Dr. Raymond Avendt (Doc. 113).

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A. Background

Beginning in 1927, Cerro owned and operated a plant in the Village of Sauget. Immediately to the north of Cerro's plant, separated by railroad tracks, is Monsanto's William G. Krummrich plant. Monsanto uses the Krummrich plant for the manufacture and refinement of organic and inorganic chemicals. Monsanto also produced polychlorinated biphenyls (PCBs) from approximately 1935 through 1977. Monsanto was the only producer of PCBs in the United States.

Dead Creek was a body of water located in St. Clair County, Illinois. Portions of Dead Creek lay on either side of the railroad tracks on both Monsanto's and Cerro's property. In 1924, the Village of Monsanto, now called the Village of Sauget, installed a 36 inch pipe to connect Dead Creek waters under the railroad tracks. In 1933, the Village built a sewer line, running east to west under a portion of the Krummrich Plant, to carry industrial waste and storm water from various commercial entities and residential homes. Shortly thereafter, Monsanto built a plant sewer system and connected it to the Village sewer line. Through its newly constructed sewer line, Monsanto disposed of industrial waste into the Village sewer line. In 1935, Monsanto filled in the portion of Dead Creek that lay on its property. The 36 inch line remained open toward the portion of Dead Creek which lay on Cerro's land (Dead Creek Sector A or DCA).

In 1939, the Village connected the 36 inch line still open to DCA to the Village sewer system. This use of the 36 inch pipe allowed Dead Creek to serve as a surge pond for the Village sewer system. When the flow in the Village sewer system exceeded its capacity, usually during storms, the excess flow (including the industrial effluent) discharged into DCA. Much of this industrial effluent came from the Krummrich plant. However, in 1986 Monsanto installed a 46 inch sewer to dispose of all of its industrial waste water instead of putting it in the Village sewer. During storms, runoff from the Cerro plant was also diverted into DCA. Various other commercial entities also dumped industrial waste into DCA.

In May of 1980, the Illinois Environmental Protection Agency (IEPA) began to investigate the contamination of Dead Creek. After publishing several studies and conducting meetings, the IEPA, in July 1985, issued a Record of Decision (ROD) regarding Dead Creek. The ROD proposed a comprehensive feasibility study (FS) for Dead Creek and recommended retaining

Ecology and Environmental Inc. (E&E). In September 1985, the IEPA retained E&E to conduct an FS for various sites, including DCA. During the course of E&E's investigation, the IEPA kept the public informed of the proceedings in Sauget.

In May 1988, E&E issued its report. The E&E report found that DCA was highly contaminated. In addition, this highly contaminated water was filtering into the groundwater beneath DCA and flowing away from DCA in all directions. The report warned that this presented "potential health hazards to the public in the area."

Cerro, recognizing this danger, set out to clean up DCA. Pursuant to this goal, Cerro retained the Avendt Group, Inc. (Avendt) to perform a site investigation and remedial alternatives evaluation of DCA and a feasibility analysis of DCA. Avendt's study was completed in June 1990. On July 5, 1990, a complaint was filed and a Consent Decree was entered into by Cerro and the State of Illinois. The Consent Decree required Cerro to conduct the clean-up action recommended by the Avendt study. Cerro began the clean up of DCA on July 16, 1990, and completed the project on November 26, 1990. The project cost Cerro Twelve Million Eight Hundred Thirty Six Thousand Six Hundred Nine Dollars ($12,836,609).

This action arises out of Cerro's clean up of DCA. Cerro filed a five-count complaint against Monsanto. Most of these counts were dismissed on summary judgment in an Order dated March 31, 1995. Only Cerro's request for contribution under Section 113(f) of CERCLA, **42 U.S.C. § 9613(f)**, remains. As described above, the parties filed various motions with regard to this remaining claim.

B. Partial Summary Judgment

Cerro has moved for partial summary judgment as to Monsanto's liability for DCA contamination. Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." **FED. R. CIV. P. 56(C)**. The movant (here Cerro) bears the burden of establishing the absence of fact issues and entitlement to judgment as a matter of law, and all doubts are to be resolved in favor of the non-movant. ***Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984)**. If the party moving for summary judgment "does not discharge that burden then he is not entitled to judgment." ***Id.***

In reviewing a summary judgment motion, the court does not determine the truth of the asserted matter but rather decides whether there is a genuine factual issue for trial. ***Harms v. Godinez*, 829 F. Supp. 259, 261 (N.D. Ill. 1993)**. In making this determination, "the entire record is considered with all reasonable inferences drawn in favor of the non-movant and all factual disputes resolved in favor of the movant." ***Tregenza*, 823 F. Supp. at 1411**.

Application of that standard discloses that Cerro has not shown the absence of genuine issues of material fact. Under Section 113(f) of CERCLA, **42 U.S.C. § 9613(f)**, "any person may seek contribution from any other person who is liable or potentially liable under" Section 107(a) of CERCLA. ***Town of Munster v. Sherwin Williams*, 27 F.3d 1268, 1270 (7th Cir. 1994)**. To establish Monsanto's liability under CERCLA, Cerro must prove that there are no genuine issues of material fact for each part of a four-part test: "(1) that the site in question is a facility as defined by Section 9601(9); (2) that the defendant is a 'responsible person' under Section 9607(a); (3) that there was a release or threat of a release of hazardous substances; and (4) that such release caused the

plaintiff to incur response costs." ***G.J. Leasing Company, Inc. v. Union Electric Company*, 825 F. Supp. 1363, 1377 (So. Ill. 1993).**

Cerro seeks to hold Monsanto liable under two theories: First, Cerro asserts that Monsanto is liable as an arranger under Section 107(a)(3) of CERCLA, **42 U.S.C. § 9607(a)(3)**. This theory uses DCA as a facility. There is, however, a question of fact as to whether Monsanto is a responsible person under Section 9607(a). Monsanto presented evidence that it did not discharge waste water into DCA. For example, several depositions establish the likelihood that the DCA contamination resulted from parties other than Monsanto. Thus, a genuine issue of material fact exists as to whether or not Monsanto is a "responsible party" under Section 107(a)(3). This issue precludes summary judgment. **See *G.J. Leasing*, 825 F. Supp. at 1377**.

Second, Cerro asserts that Monsanto is liable as an owner/operator of a facility under Section 107(a)(2) of CERCLA, **42 U.S.C. § 9607(a)(2)**. Here Cerro alleges that the Krummrich Plant is a facility. Even assuming the Krummrich Plant is a facility as defined under CERCLA, there remains an issue of material fact as to whether or not Monsanto released any industrial effluent into the environment, *i.e.*, DCA. The issue of material fact as to whether "there was a release or threat of a release of hazardous substances" is to be resolved at trial. ***G.J. Leasing* at 1377**.

Therefore, Cerro's Motion for Partial Summary Judgment (Doc. 130) is hereby **DENIED**.

C. Jury Demand

Monsanto has moved to strike Cerro's jury demand. The Seventh Amendment to the United States Constitution provides that, "In suits at common law where the value in controversy

shall exceed $20, the right of trial by jury shall be preserved." U.S. Const. Amend. 7. However, when a Court exercises its equitable jurisdiction, the Constitution does not entitle the defendant to trial by jury. See ***Ross v. Bernhard*, 396 U.S. 531, 533 (1970).** Cerro asserts that its Section 113 contribution claim is legal in nature and, therefore, Cerro is entitled to a jury trial. The Court disagrees.

When deciding Section 113(f) cases, the district courts exercise their equitable jurisdiction. "In resolving contribution claims, the court may allocate response costs among liable parties using such *equitable* factors as the court determines are appropriate." **42 U.S.C. §9613(f) (emphasis added).** See also ***Richmond Fredericksburg and Potomac Company v. Clarke*, No. 90-00336, 1991 WL 321033 (E.D. VA. January 22, 1991).** Furthermore, the underlying issues in a Section 113(f) contribution claim are whether or not the defendant is liable for costs which the plaintiffs have paid. "These issues of response cost liability and apportionment of restitutionary relief are equitable in nature and do not entitle defendants to a trial by jury." ***American Cyanamid Company v. King Industries, Inc.*, 814 F. Supp. 209, 212 (D.R.I. 1993).** Thus Cerro is not entitled to a trial by jury and Monsanto's Motion to Strike Cerro's Jury Demand (Doc. 110) is hereby **GRANTED**.

D. Attorney's Fees

In its Section 113(f) complaint, Cerro prays for the costs and disbursements of this litigation, including reasonable attorneys' fees. Monsanto filed a motion to strike this prayer for attorneys' fees. Attorneys' fees generally are not a recoverable cost of litigation absent explicit congressional authorization. ***Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1965 (1994).**

CERCLA does not permit the award of a private litigant's attorneys' fees. ***Id.* at 1967.** Therefore, Cerro cannot recover its attorneys' fees associated with prosecuting its Section 113 cause of action.[1]

Therefore, Monsanto's Motion to Strike Cerro's Prayer for Attorneys' Fees (Doc. 108) is hereby **GRANTED.**

E. Expert Testimony

Finally, Monsanto moves to exclude the expert testimony of Dr. Raymond Avendt. Monsanto relies on the fact that Cerro did not comply with Rule 26(a)(2)(B) and, therefore, cannot present Dr. Avendt as an expert witness. Rule 26(a)(2) requires a party to disclose the identity of any person who may be used at trial as an expert.

> [T]his disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case ... be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed on the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. **FED. R. CIV. P. 26(a)(2)(B).**

Cerro attempts to use the Avendt Group's report entitled "Site Investigation/Feasibility Study for

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[1] However, this does not mean that Cerro cannot recover any attorneys' fees from Monsanto. Cerro can recover for any work by its attorneys that is a necessary cost of the clean up, including identifying other potentially responsible parties. ***Key Tronic*, 114 S. Ct. at 1967.**

Creek Segment" as the written report required under Rule 26. Cerro also tries to supplement this report with a letter to Monsanto and a statement by Dr. Avendt. This hodge podge of material does not satisfy the terms of Rule 26(a)(2)(B). For example, Dr. Avendt did not himself write or sign the Avendt Group's report, the report does not list any exhibits to be used as the summary of or support for the opinions of Dr. Avendt, and the documents do not state the compensation to be paid for the FS study or the testimony of Dr. Avendt. Furthermore, Cerro's "Report" does not live up to the spirit of Rule 26. As the advisory committee notes state, that rule was intended to elicit the substance of a direct examination. **FED. R. CIV. P. 26 (1993)**. The Avendt Group's report, the letter from Cerro to Monsanto, and the statement by Dr. Avendt do not adequately set forth the testimony which Dr. Avendt will give at this trial.

Under Rule 37(c), "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not ... be permitted to use as evidence at a trial ... any witness or information not so disclosed." **FED. R. CIV. P. 37(C)**. Therefore, Cerro cannot use Dr. Avendt as an expert witness in the trial of this cause. Cerro *will* be permitted to call Dr. Avendt as a fact witness.

Therefore, Monsanto's Motion to Exclude Expert Testimony from Dr. Raymond Avendt (Doc. 113) is hereby **GRANTED**.

IT IS SO ORDERED.

DATED this 20th day of April, 1995.

PAUL E. RILEY
United States District Judge